(14)

No. 05-9222

Supreme Court, U.S.
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In The Supreme Court of the United States

LONNIE L. BURTON,

Petitioner,

v.

DOUG WADDINGTON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 18, 2002 – Burton's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 received by U.S. District Court for Western District of Washington.

November 8, 2002 – Report and Recommendation by U.S. Magistrate Judge dismissing habeas petition.

December 17, 2002 – Order by U.S. District Court adopting the Report and Recommendation and dismissing the habeas petition.

January 7, 2003 – Notice of appeal filed by Burton.

January 9, 2003 – Motion for certificate of appealability filed by Burton in U.S. District Court.

February 7, 2003 – Order by U.S. District Court granting in part and denying in part Burton's motion for certificate of appealability.

March 13, 2003 – Motion for certificate of appealability filed by Burton in the U.S. Court of Appeals for the Ninth Circuit on the issue of whether his sentence violated *Apprendi v. New Jersey*.

June 17, 2003 – Order by Ninth Circuit construing March 13, 2003 motion as a motion for broader certification and denying it. The Order also directed the appointment of counsel for Burton.

November 14, 2003 – Motion to broaden scope of appeal to include the issue of whether his sentence violated *Apprendi v. New Jersey* filed by Burton in the Ninth Circuit.

June 28, 2004 – Order by Ninth Circuit granting Burton's motion to broaden the scope of appeal.

July 28, 2005 – Order by Ninth Circuit affirming the dismissal of the habeas petition.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LONNIE LEE BURTON, Defendant.	No. 93-1-06948-7 SEA **SECOND AMENDED JUDGMENT AND SENTENCE** (Filed Mar. 16, 1998)

I. HEARING

1.1 The defendant, the defendant's lawyer, MICHAEL SCHWARTZ, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

1.2 The state has moved for dismissal of count(s) _____

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S) The defendant was found guilty on (date). 10/31/94 by jury verdict of:

Count No. I Crime: RAPE IN THE FIRST DEGREE
RCW 9A.44.040(1) Crime Code 00728
Date of Crime 10/18/91 Incident No. _____

Count No. II Crime: ROBBERY IN THE FIRST DEGREE
RCW 9A.56.200(1)(a) Crime Code 02904
Date of Crime 10/18/91 Incident No. _____

Count No.: III Crime: BURGLARY IN THE FIRST DEGREE
RCW 9A.56.020 Crime Code 02304
Date of Crime 10/18/91 Incident No. _____
☐ Additional current offenses are attached in Appendix A.

SPECIAL VERDICT/FINDING(S):

(a) ■ A special verdict/finding for being armed with a Firearm was rendered on Count(s): I, II, III

(b) ☐ A special verdict/finding for being armed with a Deadly Weapon other than a Firearm was rendered on Count(s):

(c) ☐ A special verdict/finding was rendered that the defendant committed the crime(s) with a sexual motivation in Count(s): _____

(d) ☐ A special verdict/finding was rendered for Violation of the Uniform Controlled Substances Act offense taking place ☐ in a school zone ☐ in a school ☐ on a school bus ☐ in a school bus route stop zone ☐ in a public park ☐ in public transit vehicle ☐ in a public transit stop shelter in Count(s): _____

(e) ☐ Vehicular homicide ☐ Violent Offense (D.W. and/or reckless) or ☐ Nonviolent (disregard safety of others)

(f) ☐ Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score (RCW 9.94A.400(1)(a)) are: _____

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

	Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a)	FRAUD	1/9/92	ADULT	10E01 9110 CF 636	INDIANA
(b)	THEFT	1/9/92	ADULT	10E01 9110 CF 636	INDIANA
(c)	FORGERY	5/31/98	ADULT	90-1-6110-4	KING CO.
(d)	RAPE CHILD 2	11/20/92	ADULT	92-1-02798-1	KING CO.

■ Additional criminal history is attached in Appendix B.

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	16	XI	210 to 280 MONTHS	24 MONTHS	234 to 304 MONTHS	LIFE AND/OR $50,000
Count II	10	IX	129 to 171 MONTHS	24 MONTHS	153 TO 195 MONTHS	LIFE AND/OR $50,000
Count III	10	VII	87 to 116 MONTHS	18 MONTHS	105 TO 134 MONTHS	LIFE AND/OR $50,000

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE:

■ *Substantial and compelling reasons exist* which justify a sentence above the standard range for Count(s) I, II, III; to wit: imposing consecutive sentences for Counts I, II and III. In the alternative, substantial and compelling reasons exist which justify a sentence above the standard range for Count I. Findings of Fact and Conclusions of Law are attached in Appendix D. The State ■ did ☐ did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

☐ The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT (restitution previously ordered):

☐ Defendant shall pay restitution to the Clerk of this Court as previously determined by this court and ordered in Appendix E to the Judgment and Sentence dated 12/19/94 and 1/22/96, or other appropriate order of this court; any said order(s) imposing restitution hereby are incorporated by reference.

☐ Restitution to be determined at future hearing on (Date) _____ at _____.m ☐ Date to be set

☐ Defendant waives presentence at future restitution hearing(s).

~~Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of $100 if all crime(s) date prior to 6-6-06 and $500 if any crime date in the Judgment is after 6-6-06.~~

☐ Restitution is not ordered.

4.2 OTHER FINANCIAL OBLIGATIONS: The Court previously considered the defendant's present and likely future financial resources, and imposes legal financial obligations as previously determined by this court and ordered on 12/19/94 and 1/22/96; the Court's previous rulings regarding the defendant's financial obligations hereby are incorporated by reference.

(a) ☐ $___; Court costs; ☐ Court costs are waived;

(b) ☐ $___, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104, ☐ Recoupment is waived (RCW 10.01.160);

(c) ☐ $___, Fine; ☐ $1,000, Fine for VUCSA; ☐ $2,000, Fine for subsequent VUCSA; ☐ VUCSA fine waived (RCW 69.50.430);

(d) ☐ $___, Incarceration costs; ☐ Incarceration costs waived (9.94A.145(2));

(e) ☐ $___, Other costs for_____.

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: $_____. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: ☐ Not less than $___ per month; ■ On a schedule established by the defendant's Community Corrections Officer. ☐: _____ The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of

sentence or release from confinement to assure payment of financial obligations.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing, immediately (defendant in custody):

4.4(a) An exceptional sentence is imposed; to wit: the terms set forth in Count I, II and III shall run consecutively to each other, as follows:

304 months on Count I
153 months on Count II
105 months on Count III
562 months total confinement

4.4(b) In the alternative, if for any reason the exceptional, consecutive sentence imposed in ¶ 4.4(a) is invalid, the defendant is sentenced to an exceptional sentence as follows:

506 months on Count I (exceptional sentence)
153 months on Count II
105 months on Count III

ENHANCEMENT time due to special deadly weapon (firearm) finding of 24 months is included for Counts I and II, and 18 months for Count III.

The terms in Counts I, II, III are consecutive. (The terms in Counts I, II, III of the alternative sentence are concurrent.) The sentence herein shall run consecutively to 92-1-02798-1 (King County) and any other cause not referred to in this Judgment.

Credit is given for ☑ all days served ☑ days as determined by the King County Jail and the Department of Corrections solely for conviction under this cause number pursuant to RCW 9.94A.120(15).

4.5 ■ NO CONTACT: For the maximum term of LIFE, defendant shall have no contact with Michael Cramblit, Ray Cramblit, Leslie Cramblit or the Cramblit residence. Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

4.7 COMMUNITY PLACEMENT, RCW 9.94A.120(9), Community Placement is ordered for any of the following eligible offenses: any "sex offense", any "serious violent offense", second degree assault, any offense with a deadly weapon finding, any CH. 69.50 or 69.52 RCW offense, for the maximum period of time authorized by law. All standard and mandatory statutory conditions of community placement are ordered.

■ Appendix H (for additional conditions) is attached and incorporated herein.

4.8 ☐ WORK ETHIC CAMP: The court finds that the defendant is not eligible for work ethic camp RCW 9.94A.137.

4.9 ■ SEX OFFENDER REGISTRATION (sex offender crime conviction): Appendix J is attached and incorporated by reference into this Judgment and Sentence.

4.10 ☐ ARMED CRIME COMPLIANCE, RCW 9.94A.103,105. The State's plea/sentencing agreement is ☐ attached ☐ as follows: _____

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 3/13/98 Judge /s/ Patricia Aitken

Print Name: Patricia Aitken

Presented by:

/s/ S. O'Toole
Deputy Prosecuting Attorney, WSBA ID #91002

Print Name: S. O'Toole

Approved as to form:

/s/ Michael Schwartz
Attorney for Defendant, WSBA # 11175

Print Name: Michael Schwartz

FINGERPRINTS

[Fingerprints Omitted In Printing]

Defendant's Signature:
/s/ _____

Address CIO Department of Corrections

Right Hand

Fingerprints Of:

Lonnie Burton

Attested By:
M. Janice Michels, Superior Court Clerk
By: /s/ Traci Irvine
Deputy Clerk

TRACI IRVINE

Dated: 3-13-98

/s/ Patricia Aitken
Judge, King
County Superior Court

PATRICIA AITKEN

Certificate

Offender Identification
CC #1384686

I, _____, Clerk of this Court, certify that the above is a true copy of the Judgment And Sentence in this action on record in my office.

S.I. D. No. 13663311
DOB 5-10-65
SEX M
RACE White

Dated:

_____
Clerk

By: _____
Deputy Clerk

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LONNIE LEE BURTON Defendant,	No. 93-1-06948-7 SEA APPENDIX B JUDGMENT AND SENTENCE – (FELONY) – ADDITIONAL CRIMINAL HISTORY

2.3 The defendant has the following additional criminal history used in calculating the offender score (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
Child Molestation 2	11/20/92	ADULT	92-1-02798-1	KING CO.
Sexual Exploitation of Minor	11/20/92	ADULT	92-1-02798-1	KING CO.

☐ The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.360(II)):

Date: 3/13/98 /s/ Patricia Aitken

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LONNIE LEE BURTON Defendant,	No. 93-1-06948-7 SEA APPENDIX G ORDER FOR BLOOD TESTING AND COUNSELING

(1) ☑ HIV TESTING AND COUNSELING:

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense committed after March 23, 1988. RCW 70.24.340):

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

(2) ☑ DNA IDENTIFICATION:

(Required for defendant convicted of sexual offense or violent offense RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood sample for DNA Identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangement for the test to be conducted within 15 days

If both (1) and (2) are checked, two independent blood samples shall be taken.

Date: 3/13/98 /s/ Patricia Aitken
JUDGE, King County
Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. LONNIE LEE BURTON Defendant,	)	No. 93-1-06948-7 SEA APPENDIX H COMMUNITY PLACEMENT

The Court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

COMMUNITY PLACEMENT: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement:

(1) Report to and be available for contact with the assigned community corrections officer as directed;

(2) Work at Department of Corrections-approved education, employment, and/or community service;

(3) Not consume controlled substances except pursuant to lawfully issued prescriptions,

(4) While in community custody not unlawfully possess controlled substances;

~~(5) Pay community placement fees as determined by the Department of Corrections;~~

(6) Receive prior approval for living arrangements and residence location; and

(7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision or both (RCW 9.94A.120(13))

WAIVER: The following above-listed mandatory conditions are waived by the court: _____

(b) ☐ **OFF-LIMITS ORDER (SODA)**: The Court finds that the defendant is a known drug trafficker as defined in RCW 10.66.010(3) who has been associated with drug trafficking in an area described in Attachment A. Attachment A is incorporated by reference into the Judgment and Sentence and the Court also finds that the area described in Attachment A is a Protected Against Drug Trafficking area (PADT). As a condition of community placement, the defendant shall neither enter nor remain in the PADT area described in Attachment A. _____

(c) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement: _____

(See Attached Special Conditions)

Date: 3/13/98 /s/ Patricia Aitken
JUDGE, King County
Superior Court

SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. LONNIE LEE BURTON Defendant.	No. 93-1-06948-7 SPECIAL CONDITIONS OF COMMUNITY PLACEMENT – APPENDIX H –

1. Within thirty days of release from confinement, enter into and make reasonable progress in mental health counseling, and/or sexual deviancy therapy, with a therapist approved by your Community Corrections Officer.

2. Have no contact with any minor-age children without the approval of your Community Corrections Officer and mental health treatment counselor.

3. Consume no alcohol and submit to testing to provide proof of compliance, upon reasonable cause to believe non-compliance.

4. Do not use or possess illegal or controlled substances without the written prescription of a licensed physician and submit to testing and search of your person, residence and vehicle, upon reasonable cause to believe non-compliance.

5. Within thirty days of release from confinement, obtain a substance abuse evaluation and, if deemed appropriate by that evaluation, enter into treatment and not discontinue treatment without the permission of your Community Corrections Officer.

6. Hold no position of authority or trust involving children.

7. Avoid places where children congregate.

8. Do not initiate or prolong physical contact with children for any reason without supervision of guardians or parents with knowledge of this conviction.

9. Do not frequent places where minors are known to congregate without the specific permission of the sexual deviancy counselor or the Community Corrections Officer.

10. Inform the Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved.

11. Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

12. Submit to polygraph and plethyamograph testing upon the request of your therapist and/or Community Corrections Officer, at your own expense and upon reasonable cause to believe there is a violation of conditions 2, 6, 7, 8, 9, 10, 11, and 14 above.

13. Within thirty days of sentencing, submit to DNA and HIV testing as required by law.

14. Do not hold a position as a referee of any sport which involves children.

DATE: 3/13/98

/s/ Patricia Aitken
Judge, King County
Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON Plaintiff, v. LONNIE LEE BURTON Defendant.	No. 93-1-06948-7 SEA APPENDIX J JUDGMENT AND SENTENCE – SEX OFFENDER NOTICE OF REGISTRATION REQUIREMENTS

The defendant having been convicted of a sex offense ((a) Violation of Chapter 9A.44 RCW or RCW 9A.64.020 or RCW 9.68A.090 or that is, under Chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes or (b) a felony with a finding of sexual motivation under RCW 9.94A.127, the defendant is hereby notified of sex offender registration requirements of RCW 9A.44 130-140 and is ordered to register with the county sheriff in accordance with the following registration requirements.

REGISTRATION REQUIREMENTS

1. The defendant must register with the Sheriff of the county in Washington state where he resides. When registering, the defendant shall provide the county sheriff with the following: (a) name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; (h) social security number; (i) photograph; and (j) fingerprints. The defendants must register immediately upon completion of being sentenced if not sentenced to begin serving a term of confinement immediately upon completion of being sentenced. Otherwise, he must register within 24 hours of

the time of his release if sentenced to the custody of the Department of Corrections, Department of Social and Health Services, a local division of youth services, a local jail, or a juvenile detention facility.

2. If defendant does not now reside in Washington, but subsequently moves to this state, he must register within 24 hours of the time he begins to reside in this state, if at the time of the move he is under the jurisdiction of the Department of Corrections, the Indeterminate Sentence Review board, or the Department of Social and Health Services. If at the time of defendant's move to this state he is not under the jurisdiction of one of those agencies, then he must register within 30 days of the time defendant begins to reside in this state.

3. If defendant subsequently changes residences within a county in this state, he must notify the county sheriff of that change of residence in writing within 14 days prior to the change of residence. If defendant subsequently moves to a new county within this state he must register all over again with the sheriff of the new county and must notify the former county sheriff (i.e. the county sheriff of his former residence) of that change of residence in writing, and defendant must complete both acts within 14 days prior to the change of residence.

4. It is a crime to knowingly fail to register in accordance with the above registration requirements.

I have read and understand these sex offender registration requirements.

/s/ Lonnie Burton
Defendant

Date: 3/13/98

/s/ Patricia Aitken
JUDGE, KING COUNTY
SUPERIOR COURT

Presented by:

/s/ S. O'Toole
Deputy Prosecuting
Attorney

Approved as to form:

/s/ Michael Schwartz
Defense Attorney #11175

SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LONNIE LEE BURTON, Defendant.	NO. 93-1-06948-7 SEA APPENDIX D FINDINGS OF FACT, CONCLUSIONS OF LAW REGARDING IMPOSITION OF EXCEPTIONAL SENTENCE (Filed Apr. 2, 1998)

THE ABOVE-ENTITLED CAUSE came on for sentencing on March 6 and 13, 1998, on the motion of the State pursuant to RCW 9.94A.390 for the imposition of an exceptional sentence. The plaintiff, State of Washington, was represented by Norm Maleng, Prosecuting Attorney for King County, through his deputy, Scott O'Toole. Defendant Lonnie Lee Burton appeared in person and was represented by his attorney, Michael Schwartz.

The Court, having considered the record herein, legal authority cited by the parties and the argument of counsel, and being fully advised in the premises, determines that substantial and compelling reasons exist to impose an exceptional sentence above the standard range, based upon the following:

I. FINDINGS OF FACT

1. On October 31, 1994, the defendant, Lonnie Lee Burton, was found guilty of Rape in the First Degree, Robbery in the First Degree and Burglary in the First

Degree, each committed while armed with deadly weapon, arising out the assault of Michael Cramblit.

2. On October 18, 1991, the defendant went to the Cramblit residence armed with a gun. Michael Cramblit, who was then 15 years old, was at home, alone. Michael answered the front door, where he was confronted by the defendant. After a brief conversation, the defendant drew his weapon and forced his way into the residence.

3. The defendant then forced Michael upstairs into Michael's bedroom. Once there, he forced Michael onto his bed, made him disrobe and then orally and anally raped Michael at gunpoint.

4. The State has moved this Court for an exceptional sentence above the standard range based upon the following:

(a) The "multiple offense policy" of the Sentencing Reform Act, as set forth at RCW 9.94A.390(2)(i) and Washington case authority.

(b) Deliberate cruelty, as set forth at RCW 9.94A.390(2)(a) and Washington case authority.

(c) Sophistication and planning, as provided under Washington law.[1]

Calculating the Defendant's Offender Score

5. In May 1991, the defendant was sentenced to 60 days in jail for Forgery on King County Case No. 90-1-06110-4.

---

[1] A fourth possible basis – future dangerousness – was withdrawn by the State at the sentencing hearing on March 6, 1998.

The jail term commenced July 1, 1991, and was completed in August 1991.

6. In approximately August 1991, the defendant was charged in Snohomish County with Rape of a Child in the Third Degree, Case No. 91-1-01109-0, and was held in custody there. When the victim of that crime became unavailable, the defendant was released from custody in early October 1991. The present offenses occurred on October 18, 1991.

7. Later in October 1991, the defendant was arrested in Indiana for offenses occurring there in October 1991.

(a) On January 9, 1992, the defendant was convicted on Clark County (Indiana) Case No. 10E01 9110 CF 636 of Theft and Fraud, both felonies. These matters were not the same criminal conduct because they involved different victims.

(b) The Indiana sentences were imposed concurrently with each other and with a conviction from Floyd County (Indiana) Case No. 22D01 9110 CF 239 for Receiving Stolen Property. The judgment read that it was to "run concurrently with sentences received in Floyd County, Indiana, and in the State of Washington."

8. The defendant subsequently was returned to Washington State and was convicted of Rape of a child in the Third Degree in Snohomish County. He was sentenced on September 2, 1992. That conviction later was reversed on appeal.

9. In April 1992, the defendant was charged with Rape of a Child in the Second Degree, Child Molestation in the Second Degree and Sexual Exploitation of a Minor, King County Case No. 92-1-02798-1.

(a) On October 1, 1992, the defendant pleaded guilty to Rape of a Child in the Second Degree, Child Molestation in the Second Degree and Sexual Exploitation of a Minor. These convictions did not represent "the same criminal conduct."

(b) On November 20, 1992, the defendant was sentenced by the Hon. William Downing to, respectively, 89 months, 102 months and 102 months, each to run concurrently with each other and with the Snohomish County conviction. The Judgment and Sentence expressly stated that . . . "the sentence herein shall run concurrently/ consecutively with the sentence in cause number(s) Sno-Co Cause # [sic] but consecutive to any other cause not referred to in this Judgment."

10. The Indiana sentences imposed on January 9, 1992, were not imposed concurrent with the King County offenses, Case No. 92-1-02798-1, sentenced in November 1992 by Judge Downing. The King County case was not filed until April 1992. The sentence also could not run concurrently with the King County forgery where the jail time was completed in August 1991.

11. The sentence imposed in Case No. 92-1-02798-1 in November 1992 by Judge Downing was concurrent only with the defendant's Snohomish County conviction. It did not run concurrently with the defendant's Indiana convictions.

12. The defendant was sentenced separately to two sets of concurrent sentences: the Indiana convictions and the King County convictions sentenced by Judge Downing. They were not sentenced to run concurrently with each other.

13. At the time of the original sentencing herein, this Court's primary concern regarding treatment of the defendant's prior concurrent sentences was the King

County convictions sentenced by Judge Downing. Those convictions – Rape of a Child in the Second Degree, Child Molestation in the Second Degree and Sexual Exploitation of a Minor – are matters that this Court would never, and has never, counted together as one offense for scoring purposes sexual offenses involving different victims.

14. The defendant's criminal history for purposes of calculating his offender score for Rape in the First Degree thus is as follows:

Offense	**Sentence Date**	**Cause No.**	**Score**
Fraud (Ind.)	1/9/92	10E01 9110 CF 636	1
Theft (Ind.)	1/9/92	10E01 9110 CF 636	1
Rape of Child 2	11/20/92	92-1-02798-1	3
Sex. Expl. Minor	11/20/92	92-1-02798-1	3
Child Mol. 2	11/20/92	92-1-02798-1	3
Forgery	5/31/91	90-1-06110-4	1
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Total Offender Score			16

15. The Court therefore finds that at the defendant's offender score for Rape in the First Degree is 16. Including the deadly weapon sentencing enhancement, his standard sentencing range is 234-304 months.

16. The defendant's offender score for Robbery in the First Degree is 10. Including the deadly weapon sentencing enhancement, his standard sentencing range is 153-195 months.

17. The defendant's offender score for Burglary in the First Degree is 10. Including the deadly weapon sentencing enhancement, his standard sentencing range is 105-134 months.

18. If the Court were to sentence the defendant to a standard range sentence on each count, run concurrently, he would receive the same punishment as if he had committed only the Rape in the First Degree. This would effectively result in the "free" crimes of Robbery in the First Degree and Burglary in the First Degree because he would receive no additional penalty for those crimes.

The Defendant's Acts of Deliberate Cruelty

19. The defendant's actions toward the victim at the time of the incident included ordering the victim – a 15 year old boy – to undress; engaging in multiple sexual penetrations – oral rape and anal rape – of the victim; repeatedly threatening to shoot the victim if he resisted him, moved or otherwise did not comply with the defendant; ordering the victim to lie still for 15 minutes following the rape, and threatening to shoot him if he did not comply; ransacking the victim's home such that the victim could hear him as he lay motionless following the rape.

20. When the victim's father arrived home later on the day of the incident, he found his son lying motionless, with his eyes closed, frightened to move because of concern the defendant was still in the house.

Sophistication and Planning

21. The evidence admitted at trial included a letter written by James Martin regarding admissions made by the defendant while both were in custody in Indiana. Mr. Martin wrote a letter to Snohomish County Deputy Prosecuting Attorney Mark Roe, dated March 15, 1992. That letter was admitted at trial as Exhibit 14.

22. Exhibit 14 contains a number of admissions made by the defendant to Mr. Martin, including that the defendant "followed this young boy from school after watching his house on numerous accounts [sic]"; that "he went to his home knowing his parents wouldn't be home"; that "he said he had some season hockey tickets for sale"; that he "asked the boy was anyone of age home, and asked to use the phone and forced his self [sic] in"; that "he told the boy it was 2:35 and to not move until 2:45."

From the foregoing facts, the Court now makes the following:

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the defendant and the subject matter in the above-entitled cause.

2. The sentence imposed herein shall be consistent with the purposes of sentencing under the Sentencing Reform Act (SRA), RCW 9.94A.010, including, but not limited to, ensuring that the punishment imposed is proportionate to the seriousness of the offense and the defendant's criminal history, and that it is commensurate with the punishment imposed on others committing a similar offense.

3. The rape and robbery in the present case were not the "same criminal conduct." The objective intent of each crime was different.

4. Under the burglary anti-merger statute, RCW 9A.52.050, and the authority of *State v. Lessley*, 118 Wn.2d 773 (1992), the Court exercises its discretion to punish the burglary separately.

5. Pursuant to *State v. Bolar,* 129 Wn.2d 361 (1996), this Court must be consistent in its treatment of the defendant's prior convictions for which the defendant received concurrent sentences; i.e., for purposes of calculating the defendant's offender score, the Court either must count the Indiana convictions, as well as the King County convictions, individually and separately *or* the Court must count each group of convictions as one.

6. Had the principles enunciated in *State v. Bolar* been called to the Court's attention at the time of the original sentencing, this Court would have counted the defendant's Indiana convictions separately because they did not involve the same criminal conduct. The Court expressly counts those convictions separately at this time for purposes of calculating the defendant's offender score. The Court also expressly counts the defendant's King County convictions separately at this time for purposes of calculating the offender score.

7. Substantial and compelling reasons exist for imposing an exceptional sentence above the standard sentencing range. Those reasons take into account factors other than those ordinarily considered in computing the presumptive sentencing range for this offense.

8. The defendant's long criminal history, combined with the "multiple offense policy," results in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act. RCW 9.94A.390(2)(i). The fact that the defendant's offender score for Rape in the First Degree is 16 makes the defendant a significantly different offender than one who comes before the Court similarly

convicted of the offenses of which the defendant has been found guilty. Failure to take into account the defendant's offender score of 16 would frustrate the purposes of the SRA.

9. The fact that the defendant's offender score for Rape in the First Degree is 16, thus invoking the "multiple offense policy of the SRA, standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence herein. RCW, 9.94A.390(2)(i).

10. The actions of the defendant and the prolonged period of degradation of the victim amounted to deliberate cruelty towards the victim. The facts establishing the defendant's deliberate cruelty toward the victim makes the defendant a significantly different offender than one who comes before the Court similarly convicted of the offenses of which the defendant has been found guilty. Failure to take into account his acts of deliberate cruelty would frustrate the purposes of the SRA.

11. The defendant's deliberate cruelty toward the victim, standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence herein. RCW 9.94A.390(2)(a); *State v. Herzog,* 69 Wn.App. 521, 526-27 (1993); *State v. Talley,* 83 Wn.App. 750, 762-63 (1996); *State v. Franklin,* 56 Wn.App. 915, 918-19 (1989); *State v. Havens,* 70 Wn.App. 251, 254 (1993); *State v. Dunaway,* 109 Wn.2d 207, 219 (1987).

12. The evidence demonstrates that the defendant targeted the victim over an extended period of time, leaning where the victim went to school and where he lived. On the day of the assault, the defendant went to the

victim's home knowing his parents were not there. The defendant's inquiry regarding whether "anyone of age was home" was verification that the victim's parents were absent (i.e., "double checking"). He employed an elaborate scheme to relax the victim's guard and gain access to his home by representing himself to be a salesman of season hockey tickets and then asking to use the telephone.

13. The actions of the defendant demonstrate sophistication and planning of sort that makes the defendant a significantly different offender than one who comes before the Court similarly convicted of the offenses of which the defendant has been found guilty. Failure to take into account the defendant's sophistication and planning would frustrate the purposes of the SRA.

14. The defendant's sophistication and planning in the commission of this crime, standing alone, is a substantial and compelling reason and justification for imposing an exceptional sentence herein.

15. The Court incorporates by reference herein it [sic] oral decision.

16. All the facts considered by the Court in determining that an exceptional sentence is appropriate on the basis of "Deliberate Cruelty" and "Sophistication and Planning" were proven at trial before this Court. At trial, the Court heard, the testimony of James Martin, Ray Cramblit, Michael Cramblit and the defendant, as well as other State's witnesses and the alibi witnesses presented by the defense. The Court also admitted Exhibit 14. The defendant has not identified any *additional* witnesses with

relevant testimony on the issues relevant to the exceptional sentence. Therefore this Court finds a further evidentiary hearing to be unnecessary.

Based upon the foregoing findings of fact and conclusions of law, the Court hereby orders:

ORDER

The plaintiff's motion to impose an exceptional sentence above the standard sentencing range is granted. The original sentence imposed herein is reimposed.

The defendant is hereby sentenced to 304 months in prison for the Rape in the First Degree, 153 months in prison for Robbery in the First Degree, and 105 months in prison for Burglary in the First Degree, *all sentences to run consecutively to each other for a total of 562 months in prison.*

In the alternative, and in the event that the exceptional sentence of consecutive terms on Counts I, II and II [sic] is for any reason invalidated or subsequently found not to be within the order of remand from the Court of Appeals, the defendant is sentenced to an exceptional sentence of 506 months for Rape in the First Degree, 153 months in prison for Robbery in the First Degree, and 105 months in prison for Burglary in the First Degree, all sentences to run concurrently with each other.

All other terms and conditions set forth in the Judgment and Sentence dated March 13, 1998, are incorporated by reference.

DONE IN OPEN COURT this ~~13~~th 31 day of March, 1998.

/s/ Patricia Aitken
PATRICIA H. AITKEN,
Judge

PETITION UNDER 28 USC § 2254 FOR
WRIT OF HABEAS CORPUS BY A PERSON
IN STATE CUSTODY

United States District Court	District Western District of Washington	
Name Lonnie Burton	Prisoner No. 978598	Case No C98-1846C
Place of Confinement Airway Heights Correction Center, Airway Heights, Wash.		
Name of Petitioner (include name under which convicted) Lonnie Burton	V	Name of Respondent (authorized person having custody of petitioner) Kay Walter
The Attorney General of the State of Washington; Christine Gregoire		

PETITION

(Filed Dec. 28, 1998)

1 Name and location of court which entered the judgment of conviction under attack King County Superior Court, Seattle, Wash, 98104. (#93-1-06948-7)

2. Date of judgment of conviction Dec. 16, 1994

3. Length of sentence 562 months

4. Nature of offense involved (all counts) Rape in the first degree; Robbery in the first degree; Burglary in the first degree.

5. What was your plea? (Check one)

(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details

N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?

Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following

(a) Name of court Washington State Court of Appeals, Division One.

(b) Result Affirmed conviction, reversed sentence.

(c) Date of result and citation, if known June 9, 1997 - 86 Wn. App. 1046

(d) Grounds raised Hearsay, Prosecutorial Misconduct, Other Crimes Evidence, Impeachment with Prior Reversed Sentence, Cumulative Error, Other.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following

(1) Name of court Washington State Supreme Court

(2) Result Petition Denied.

(3) Date of result and citation if known December 2, 1997 – mandate issued 1/16/98 133 Wn.2d 1025

(4) Grounds raised Same as on appeal

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal

(1) Name of court N/A

(2) Result _____

(3) Date of result and citation, if known _____

(4) Grounds raised _____

10 Other than a direct appeal from the judgment of conviction and sentence have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If you answer to 10 was yes give the following information

(a) (1) Name of court Washington State Court of Appeals, Division One.

(2) Nature of proceeding Personal Restraint Petition.

(3) Grounds raised Ineffective assistance of counsel.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Petition denied.

(6) Date of result June 9, 1997

(b) As to any second petition, application or motion give the same information

(1) Name of court Washington State Court of Appeals, Division One

(2) Nature of proceeding Personal Restraint Petition.

(3) Grounds raised Improper calculation of offender score.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result Petition denied.

(6) Date of result June 9, 1997.

(c) Did you appeal to the highest state court having jurisdiction there result of action taken on any petition, application or motion?

(1) First petition, etc Yes ☐ No ☒
(2) Second petition, etc. Yes ☐ No ☒

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not

Felt I had better issues to raise in the direct appeal.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION in order to proceed in the federal court, you must ordinarily first exhaust your available state

court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled

(i) Denial of effective assistance of counsel

(j) Denial of right of appeal

A. Ground one Conviction obtained by use of prior but reversed felony conviction.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

B Ground two Conviction obtained through denial of compulsory process.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

C. Ground three Conviction obtained through prosecutorial misconduct and impeachment with innuendo.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

D. Ground four Cumulative error.

Supporting FACTS (state *briefly* without citing cases or law) See Statement of Pertinent Facts attached to Memorandum in Support of Writ of Habeas Corpus.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☒ No ☐ THE sentence I received at resentencing is on direct appeal.

15. Give the name and address, if known of each attorney who represented you in the following stages of the judgment attacked here in

(a) At preliminary hearing Society of Counsel Representing Accused Persons Seattle, Wash.

(b) At arraignment and plea David Trieweiler, Seattle, Wash.

(c) At trial David Trieweiler, Settle, Wash.

(d) At sentencing Sentence #1: David Trieweiler; Sentence #2: Mark Tackitt, Seattle, Wash.; Sentence #3: Michael Schwartz, Seattle, Wash.

(e) On appeal Eric Broman, Nielsen, Broman & Associates, Seattle, Wash.

(f) In any post-conviction proceeding Pro se

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment in the same court and at the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future _____

(b) Give date and length of the above sentence _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒ But I am simultaneously filing two other writs on another criminal conviction and on a prison disciplinary proceeding.

Wherefore petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding

/s/ _____
Signature of Attorney
(if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

12-23-98
(date)

/s/ Lonnie Burton
Signature of Petitioner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LONNIE L. BURTON,

Petitioner,

v.

KAY WALTER,

Respondent.

Case No.
C.~~99~~ 98-1844L

ORDER

(Filed Apr. 6, 2000)

The Court, having reviewed plaintiff's complaint, the Report and Recommendation of Judge David E. Wilson, United States Magistrate Judge, and the remaining record, does hereby find and ORDER:

(1) The Court adopts the Report and Recommendation;

(2) The petition for writ of habeas corpus is denied; and

(3) This action is dismissed with prejudice

(3) The Clerk is due: to send a copy of this order to counsel of record, the Hon. David E. Wilson.

DATED this 6th day of April, 2000.

/s/ Robert S. Lasnik
Robert S. Lasnik
United States District Judge

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	No. 42312-6-I
	DIVISION ONE
v.	UNPUBLISHED
LONNIE BURTON,	OPINION
Appellant.	FILED: JUL 17, 2000

WEBSTER, J. – A jury convicted Lonnie Burton of rape, robbery, and burglary, all in the first degree. The trial court entered a judgment and sentence on December 19, 1994, and amended it a year later after an overturned prior conviction required a new sentence calculation. Because the new sentence invoked the *Pearce*[1] presumption, the Court of Appeals remanded for a proper sentence. Burton appeals his latest sentence essentially arguing that it is a violation of due process and the appearance of fairness doctrine to remand to the same judge presumed vindictive. He also contends that the sentencing court exceeded the scope of remand and erred in imposing consecutive sentences. We affirm because there is no violation of due process or the appearance of fairness doctrine. Also, the sentencing court did not exceed the scope of remand and properly imposed consecutive sentences.

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[1] *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2089, 23 L. Ed. 2d 656 (1969) (presumption of judicial vindictiveness when there is a partially successful appeal and sentence on remand is more severe than original sentence).

FACTS

On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchased the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home.

He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C by force. After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police.

After gathering evidence and searching for witnesses, the police were unable to identify the perpetrator and, a month later, marked the case as inactive. Burton had left Washington for Indiana a few days after the incident. Indiana authorities, however, detained Burton for reasons unrelated to this crime. While in an Indiana jail, Burton told inmate James Martin about the rape of M.C. as well as about a separate rape incident in Snohomish County. Martin wrote a letter to a Snohomish County deputy prosecutor about the two rape incidents.

Burton stood trial in King County Superior Court for the rape of M.C. and for robbery and burglary, all in the first degree. Although the physical evidence was inconclusive, M.C. had identified Burton from a line-up as the one

who most looked like his assailant. In addition, a neighbor picked Burton out of a photomontage and described a car she saw on the date of the incident that closely resembled the car Burton borrowed that week. And, another inmate, one in the Snohomish County jail, was able to recite details of M.C.'s rape that Burton had revealed to him.

A jury convicted Burton of all three charged crimes. About a year after imposing consecutive sentences totaling 562 months, the sentencing court had to recalculate his offender scores because an unrelated prior conviction was overturned. In imposing a new sentence, the sentencing court ran the robbery and burglary convictions *concurrent* with the rape conviction rather than consecutive to each other. Nonetheless, the aggregate sentence still totaled 562 months. In his first appeal, this Court concluded that this sentence was not clearly excessive. But, since Burton was eligible for fewer good time credits than in his original sentence, we presumed vindictiveness following *Pearce* and its progeny.[2] On remand, the sentencing court imposed the same 562-month aggregate sentence but this time ran the three convictions consecutive to each other – rape for 304 months, robbery for 153 months and burglary for 105 months. Burton appeals, again.

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[2] *State v. Burton*, No. 39119-4-I, 1997 WL 306429, at *13-14 (Wn. App. Div. 1 June 9, 1997) (since rape offenses earn less good time than non-rape offenses, the concurrent sentencing was more severe than the original, citing *United States v. Steele*, 988 F.2d 998 (9th Cir. 1993) (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board)), *review denied*, 133 Wn.2d 1025, 950 P.2d 475 (1997).

DISCUSSION

I

Remand to the Same Judge

Burton first argues that it violates due process and the appearance of fairness doctrine for the same judge previously presumed vindictive to enter a new sentence on remand. An appellate court need not consider questions on a subsequent appeal that might have been determined earlier on a previous appeal if properly raised at that time. *State v. Bradfield*, 29 Wn. App. 679, 683, 630 P.2d 494 (1981). Burton did not request remand to a different judge on his previous appeal. He therefore waived this issue. In addition, an appellant may not raise an issue for the first time on appeal if he affirmatively waived it below, even if the issue is of constitutional magnitude. *State v. Valladares*, 99 Wn.2d 663, 671, 664 P.2d 508 (1983). Affirmatively withdrawing a motion constitutes an explicit waiver. *Valladares*, 99 Wn.2d at 672. At the third sentencing hearing, Burton explicitly withdrew his motion to change judges. Consequently, he waived this issue a second time.

Even if Burton had not waived this issue, his argument still fails. Absent personal bias, it is rare to remand sentencing proceedings to a new judge, even after finding a presumption of vindictiveness. *United States v. Rapal*, 146 F.3d 661, 666 (9th Cir. 1998). As discussed later in this opinion, the presumption of vindictiveness arose only because the sentencing judge ran Burton's sentences concurrently instead of consecutively. She did not explicitly increase his aggregate sentence. But, since the rape conviction attached the longest period of incarceration, it restricted his eligibility for good time credits more severely than his previous sentence because rape offenders cannot

earn as much good time as non-rape offenders. RCW 9.94A.150(1). The presumption of vindictiveness was a technical one. Nothing in the record indicates that the sentencing judge, (who was also the trial judge), possessed actual bias towards Burton. Absent a showing of actual bias, we find that it was not necessary for the Court of Appeals to remand to a new sentencing judge.

Nonetheless, the appearance of fairness doctrine requires more than an impartial judge but also requires a judge to appear impartial. *State v. Brenner*, 53 Wn. App. 367, 374, 768 P.2d 509 (1989). The proceeding must appear fair to a reasonably prudent and disinterested person. *Brenner*, 53 Wn. App. at 374. Here, the same judge presided over Burton's third sentencing on remand after the Court of Appeals concluded that the *Pearce* presumption applies. This Court did not find any personal bias on the part of the sentencing judge. Although we restricted the sentencing court from imposing a more severe sentence, we held that the original sentence was not clearly excessive. *Burton*, 1997 WL 306429, at *12-14. The fact that this Court remanded to the same judge to correct a mere technical deficiency should appear fair to a reasonably prudent and disinterested person. We conclude that, even if Burton had not waived this issue, remand to the same judge after finding a *Pearce* presumption does not violate due process or the appearance of fairness doctrine in this case.

II.

Scope of Remand

Next, Burton argues that the sentencing court exceeded its scope on remand and invoked a *Pearce* presumption (again) by imposing the same aggregate

sentence. The *Pearce* presumption arises when the amended sentence is more severe than the original sentence following a partially successful appeal. *Pearce*, 395 U.S. at 723-26. When the sentencing court does not increase the aggregate period of incarceration, the *Pearce* presumption does not arise. *State v. Larson*, 56 Wn. App. 323, 326, 783 P.2d 1093 (1989). Here, the sentencing court did not increase Burton's aggregate sentence.

Nonetheless, the *Pearce* presumption also arises when parole considerations can make the period of incarceration under the amended sentence longer than the original sentence. *See Steele*, 988 F.2d at 998 (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board). Previously on appeal, the Court of Appeals held that Burton's amended sentence was more severe than his original sentence because he was eligible for nearly four years fewer good time credits. *Burton*, 1997 WL 306429, at *14. This was so because the amended sentence ran concurrently so that the entire period of incarceration followed the 562-month rape sentence which limits good time to 15 percent of the term as opposed to one-third for non-rape offenses. RCW 9.94A.150(1). After the appeal, however, the sentencing court imposed consecutive sentences (562 months total) that allow Burton the opportunity to earn good time credits as favorably as in his original sentence. Burton will be able to reduce his sentences for robbery (105 months) and burglary (153 months) by up to one-third each and reduce his rape sentence (304 months) by 15 percent RCW 9.94A.150(1). He is eligible to earn early release time in segments adding up to a total of 131.60 months as opposed to 130.74 months in the original sentence. *Burton*, 1997 WL 306429, at *14. His new

sentence is slightly less severe than his original sentence. Accordingly, the *Pearce* presumption does not apply and the sentencing court did not exceed the scope of remand.

Burton further argues that the trial court exceeded the scope of remand in recalculating his offender scores. Generally, the law of the case doctrine would make the offender score binding in subsequent appeals. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905, (1996). Except, the doctrine is discretionary when controlling law changes between the appellate decision and proceedings on remand. *Coffel v. Clallam County*, 58 Wn. App. 517, 521, 794. P2d 513 (1990). Before Burton's third sentencing hearing, the Washington Supreme Court held that under RCW 9.94A.360(6), a sentencing court may not count some concurrently-served prior convictions as one offense and count others separately. *State v. Bolar*, 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). Rather, the sentencing court must count concurrently served prior convictions as one offense or each as separate offenses. *Bolar*, 129 Wn.2d at 366. Since the Washington Supreme Court made this ruling before the third sentencing hearing, the sentencing court was correct in recalculating Burton's offender score for rape as follows:

Offense	Sentence Date	Cause No.	Score
Forgery	5/31/1991	90-1-06110-4	1
Fraud (Indiana)	1/9/1992	10E01 9110 CF 636	1
Theft (Indiana)	1/9/1992	10E01 9110 CF 636	1
Sexual Exploitation of a Minor	11/20/1992	92-1-02798-1	3

Child Molestation 2	11/20/1992	92-1-02798-1	3
Rape of Child 2	11/20/1992	92-1-02798-1	3
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Offender Score for Rape			16

Following *Bolar*, the court properly added Burton's offender score for rape after counting his concurrently served prior convictions as separate offenses.[3] Therefore, the court did not exceed the scope of remand.

III.

Multiple Offense Policy

Burton challenges the sentencing court's decision to run his robbery and burglary sentences consecutively as an exceptional sentence. A court may impose an exceptional sentence if it finds substantial and compelling reasons to justify the sentence. *State v. Smith*, 123 Wn.2d 51, 55, 864 P.2d 1371 (1993) (citing RCW 9.94A.120(2)). To reverse an exceptional sentence, an appellate court must find that either (1) the record does not support the judge's reasons for imposing the exceptional sentence or (2) that the judge's reasons themselves do not justify the exceptional sentence. RCW 9.94A.210(4)(a). The first inquiry is a question of fact while the second inquiry is a question of law. *Smith*, 123 Wn.2d at 55. As to the factual inquiry, we have already determined above that the record supports

[3] The sentencing court also recalculated Burton's offender scores for robbery and burglary.

the offender score of 16 for rape – the reason for imposing the exceptional sentence.

As to the question of law, the multiple offense policy justifies the exceptional sentence. If the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is "clearly too lenient," the sentencing court may consider that as an aggravating factor for imposing an exceptional sentence. RCW 9.94A.390(2)(i), formerly RCW 9.94A.390(2)(g)(1991); *Smith*, 123 Wn.2d at 55. This is automatically proper when the presumptive sentence would result in "free" crimes – crimes without additional punishment. *Smith*, 123 Wn.2d at 55-56. A sentencing court may remedy a sentence that is "clearly too lenient by lengthening concurrent sentences and/or by imposing consecutive sentences. *Smith*, 123 Wn.2d at 57-58. In *Smith*, the Washington Supreme Court found an exceptional sentence (containing both lengthened and consecutive sentences) justified when the defendant had an offender score of 10 for multiple offenses. *Smith*, 123 Wn.2d at 56. Since the defendant's offender score of 10 placed him one point over the sentencing grid's "9 or more" category and because each second-degree burglary conviction counts for two points, he received one-half of a "free" crime. *Smith*, 123 Wn.2d at 56. Therefore, the sentencing court properly found his sentence as "clearly too lenient" and correctly imposed exceptional consecutive sentences.

Here, the sentencing court identified the multiple offense policy and Burton's offender score of 16 for rape as the basis for running the sentences for first degree robbery and first degree burglary consecutively. Substantial evidence supports the calculation of Burton's offender scores. The sentencing court found that running the standard sentences for those crimes concurrently would be

"clearly too lenient" because first degree robbery and first degree burglary would be free crimes with no additional penalty: "If the Court were to sentence the defendant to a standard range sentence on each count, run concurrently, he would receive the same punishment as if he had committed only the Rape in the First Degree." Clerk's Papers (CP) at 264. Burton's offender score of 16 placed him seven points over the sentencing grid's "9 or more" category. And, because the first degree robbery and first degree burglary convictions count for three points each, Burton would have received at least two free crimes with concurrent sentencing. The court here properly imposed consecutive standard sentences to avoid at least two free crimes.

IV. Aggravating Factors

Next, Burton argues that the sentencing court erred in considering additional aggravating factors on remand.[4] Specifically, the court found "sophistication and planning" as an aggravating factor at the third sentencing but had not made such a ruling when raised at an earlier sentencing hearing. Also, the court found "deliberate cruelty" when raised by the State for the first time at the third sentencing. Nonetheless, the sentencing court concluded that the multiple offense policy alone justified the exceptional sentence: "The fact that the defendant's offender score for Rape in the First Degree is 16, thus invoking the

[4] Courts can consider new *mitigating* factors when directed to do so by an appellate court. *State v. Ha'mim*, 132 Wn2d 834, 848, 940 P2d 633 (1987). But, there is no clear answer in the case law on the precise question presented here because the Court of Appeals did not direct the sentencing court to address additional aggravating factors to justify the exceptional sentence.

'multiple offense policy' of the [Sentencing Reform Act], *standing alone*, is a substantial and compelling reason and justification for imposing an exceptional sentence herein." CP at 268 (emphasis added). The court had cited the multiple offense policy at earlier sentencing hearings. Because the sentencing court did not rely on the additional aggravating factors for imposing an exceptional sentence, we find no error.

V. Other Sentencing Issues

Burton also challenges the sentencing court's authority to impose an alternative sentence. We do not question the court's authority because the alternative sentence is invalid on other grounds. Under the alternative sentence that ran concurrently with the rape conviction, Burton could earn only 75.90 months of good time credits as opposed to 130.74 months in his original sentence. RCW 9.94A.150(1); *Burton*, 1997 WL 306429, *14. Because the alternative sentence made Burton eligible for fewer good time credits than his original sentence, the *Pearce* presumption applies. *See Steele*, 788 F.2d at 998. The alternative sentence, therefore, violates the order of remand mandating a less severe sentence. We vacate the alternative sentence.

Burton asks the Court of Appeals to remand to a different judge upon vacation of his sentence. Because we do not vacate his enforced sentence, but only vacate the alternative sentence, there is no need for remand. Even if remand were necessary, without a showing of actual vindictiveness or personal bias, the law does not require remand to a different judge. *Rapal*, 146 F.3d at 666.

To preserve federal review, Burton asks whether his 562-month sentence for rape, robbery and burglary, and his 506-month alternative sentence, are clearly excessive. In Burton's previous appeal, this Court ruled that the 562-month sentence is not clearly excessive given the crimes he committed. *Burton*, 1997 WL 306429, *12-13. We need not readdress this issue. And, because we vacate the 506-month alternative sentence for reasons above, we do not address whether the alternative sentence is excessive.

Finally, in his pro se brief, Burton argues that the Interstate Agreement on Detainers (IAD) mandates that his Indiana sentences be concurrent with his Washington sentences. Because the Washington Supreme Court has held that the IAD does not apply to sentencing proceedings, Burton's argument fails.

State v. Barefield, 110 Wn.2d 728, 729-30, 756 P.2d 731 (1988). The trial court was correct in refusing to apply the IAD to this situation.

We affirm.

/s/ Webster, J

WE CONCUR

/s/ Ellington, J

/s/ Grosse, J

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LONNIE L. BURTON, Petitioner	NO 70036-2 **ORDER** C/Ā NO. 42312-6-I

Department II of the Court considered this matter at its December 5, 2000, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of December, 2000.

/s/ Richard P. Guy
CHIEF JUSTICE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L BURTON, *Petitioner,* v. DOUG WADDINGTON, *Respondent.*	CASE NO. C02-140L REPORT AND RECOMMENDATION

(Filed Nov. 8, 2002)

INTRODUCTION

Petitioner Lonnie L. Burton is a state prisoner currently incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington. He seeks relief under 28 U.S.C. § 2254 from a 562-month sentence, resulting from his 1994 King County Superior Court conviction on charges of first degree rape, first degree robbery and first degree burglary, with a weapon enhancement on all three. (Dkt. 3.) Specifically, petitioner challenges the 1998 resentencing for his 1994 conviction, but not the underlying conviction. After careful consideration of the record, the Court concludes that no evidentiary hearing is required, and that the Court should deny petitioner's § 2254 petition and dismiss this action with prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Court of Appeals for the State of Washington summarized the facts of petitioner's case as follows:

On October 18, 1991, Lonnie Burton followed M.C., a 15-year-old boy, home from school. According to M.C.'s testimony, there was a knock on the door shortly after he arrived from school. M.C. answered the door and found Burton selling season tickets for a local hockey team. After M.C. declined to purchase the tickets, Burton asked whether he could use the telephone. When M.C. refused, Burton took out his gun and forced his way into the home

He ordered M.C. to go upstairs and into his bedroom and not look at him. Burton then proceeded to have oral and anal intercourse with M.C. by force After he finished his sexual acts, Burton told M.C. to look at the clock and not move for 15 minutes. Before he left the house, Burton took $160 from the dresser of M.C.'s parents. Later, M.C.'s father arrived and found M.C. still frightened that Burton was in the house. M.C. told his father about the incident and they called the police.

After gathering evidence and searching for witnesses, the police were unable to identify the perpetrator and, a month later, marked the case as inactive. Burton had left Washington for Indiana a few days after the incident. Indiana authorities, however, detained Burton for reasons unrelated to this crime. While in an Indiana jail, Burton told inmate James Martin about the rape of M.C. as well as about a separate rape incident in Snohomish County. Martin wrote a letter to Snohomish County deputy prosecutor about the two rape incidents.

Burton stood trial in King County Superior Court for the rape of M.C. and for robbery and burglary, all in the first degree. Although the

> physical evidence was inconclusive, M.C. had identified Burton from a line-up as the one who most looked like his assailant. In addition, a neighbor picked Burton out of a photomontage and described a car she saw on the date of the incident that closely resembled the car Burton borrowed that week. And, another inmate, one in Snohomish County jail, was able to recite details of M.C.'s rape that Burton had revealed to him.
>
> A jury convicted Burton of all three charged crimes About a year after imposing consecutive sentences totaling 562 months, the sentencing court had to recalculate his offender scores because an unrelated prior conviction was overturned. In imposing a new sentence, the sentencing court ran the robbery and burglary convictions *concurrent* with the rape conviction rather than consecutive to each other. Nonetheless, the aggregate sentence still totaled 562 months. In his first appeal, [the Court of Appeals] concluded that this sentence was not clearly excessive. But, since Burton was eligible for fewer good time credits than in his original sentence, [the Court] presumed vindictiveness following *Pearce* and its progeny.

(Dkt. 12, Exh. 2 at 2-4 (emphasis in original) (footnotes omitted).) The Supreme Court for the State of Washington denied review of the Court of Appeals' decision on December 3, 1997 (Dkt. 3 at 3.)

On remand, the sentencing court imposed the same 562-month aggregate sentence, but this time ran the three convictions consecutive to each other – rape for 304 months, robbery for 153 months and burglary for 103 months. (Dkt. 12, Exh. 1.) The Superior Court entered this second amended judgment and sentence on March 16,

1998. Petitioner again appealed to the Court of Appeals for the State of Washington.

While that appeal of the re-sentencing was pending in state court, petitioner filed a habeas petition in this court on December 28, 1998, challenging the 1994 conviction. (*Id.*, Exh. 5.) This Court consolidated the 1998 petition with another petition that had been filed earlier under Case No. C98-1844L. The Court ultimately denied the consolidated petition with prejudice (*Id.*, Exh. 6.) The Ninth Circuit affirmed the decision in an unpublished opinion *Burton v. Walter,* No. 00-35579, 2001 WL 1243655 (9th Cir. May 30, 2001), *cert. denied,* 122 S. Ct. 1923 (2002).

On July 17, 2000, the Court of Appeals for the State of Washington affirmed petitioner's sentence. (Dkt. 12, Exh. 2.) The Supreme Court for the State of Washington denied review on December 5, 2000. (*Id.*, Exh. 4.) Petitioner then filed a personal restraint petition ("PRP") in the Supreme Court, which raised an *Apprendi* challenge to his sentence. *See In re Burton,* Supreme Court Cause No. 72010-0.

On January 18, 2002, petitioner filed the instant habeas petition. (Dkt. 3.) On the same date, petitioner lodged a motion to stay the proceedings pending the resolution of his PRP in the state courts. (Dkt. 4.) The PRP was denied, and, on April 2, 2002, petitioner's Motion to Modify the Commissioner's Ruling was also denied. (*See* Dkt. 13 at 18.) On April 11, 2002, the Court ordered a response to petitioner's habeas petition and motion to stay. (Dkt. 5.) As a part of the response, respondent was directed to state whether petitioner had exhausted available state remedies and whether the action may properly be

stayed pending a decision by the state Supreme Court on petitioner's PRP. (*Id.* at 2.)

On May 4, 2002, respondent filed a response to the motion to stay the proceedings. (Dkt. 7.) Respondent conceded that petitioner's claims have been exhausted, but asserted that this Court lacks subject matter jurisdiction over the petition because petitioner failed to obtain permission from the Ninth Circuit Court of Appeals to file the petition as required under 28 U.S.C. § 2244(b)(3)(A) for "second or successive" habeas actions.[1] Respondent thus argued that the Court should deny the motion to stay the petition. (*Id.* at 2.) Alternatively, respondent argues that petitioner's motion to stay should be denied because the petition constitutes an abuse of the writ as petitioner could have raised the claims in his previous 1998 petition. (*Id.* at 3.) Petitioner filed a reply on May 13, 2002, arguing that his current challenge was not exhausted in 1998 and, therefore, could not have been brought with his previous claims. (Dkt. 8.)

The Court was not convinced that petitioner's habeas action should be dismissed for lack of subject matter jurisdiction, and ordered respondent to file an Answer to the habeas petition which specifically addressed the issue of "second or successive petitions," as well as whether

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[1] In Case No. C98-1844L, petitioner challenged the sentence in a different case: his 1992 convictions of second degree rape of a child, second degree child molestation and second degree exploitation of a minor. (*See* Case No. C98-1844L, Dkt. 2.) In Case No. C98-1846L, petitioner challenged specific evidence admitted during the 1994 trial in this case, which resulted in convictions of first degree rape, first degree robbery and first degree burglary. (*See* Case No. C98-1846L, Dkt. 2.) The 1994 convictions underlie petitioner's exceptional sentence which he challenges in the instant habeas action.

petitioner's sentencing claims were ripe at the time he filed his first habeas petition. (Dkt. 10.)

On August 16, 2002, respondent filed an Answer and Memorandum of Authorities. (Dkt. 11.) On September 5, 2002, petitioner filed his Response. (Dkt. 13.) The briefing is now complete and the petition is ripe for review.

GROUNDS FOR REVIEW

In his habeas petition, petitioner alleges that his due process rights were violated in four respects when: (1) the trial court improperly increased his offender score at sentencing; (2) the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered; (3) the trial judge was actually vindictive against him; and (4) the sentence petitioner received which was in excess of the top range set by statute was based on factors not submitted to a jury nor proved beyond a reasonable doubt. (Dkt. 3 at 5-6.)

DISCUSSION

Exhaustion

It is well established that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v. Lundy,* 455 U.S. 509 (1982); 28 U.S.C. § 2254(b), (c). Exhaustion must be shown either by providing the highest state court with the opportunity to rule on the merits of the claim or by showing that no state remedy remains available. *Johnson v. Zenon,* 88 F.3d 828, 829 (9th Cir. 1996). Respondent concedes that petitioner has

exhausted his habeas corpus claims and, thus, habeas review is appropriate.[2] (Dkt. 11 at 4); *see also Gray v. Netherland,* 518 U.S. 152, 162-63 (1996) (discussing the exhaustion doctrine).

Standard of Review

A habeas corpus petition shall not be granted with respect to any claim adjudicated on the merits in the state courts unless the adjudication either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the U.S. Supreme Court on a question of law, or if the state court decides a case differently than the U.S. Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor,* 529 U.S. 362 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Ninth Circuit has interpreted "an unreasonable

[2] Petitioner initially moved to stay the habeas proceeding while he pursued an *Apprendi* claim by way of PRP in the Supreme Court for the State of Washington (Dkt. 4.) However, the PRP has since been denied and respondent concedes exhaustion of all claims. Thus, petitioner has now withdrawn his motion to stay. (Dkt. 13 at 7.)

application of law" to mean an application that is "clearly erroneous." *Van Tran v. Lindsey,* 212 F.3d 1143, 1152-54 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000).

In addition, if a habeas petitioner challenges the determination of a factual issue by a state court, such determination shall be presumed correct, and the applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Second or Successive Petitions

Respondent initially contends that this Court lacks jurisdiction to review petitioner's habeas claims because petitioner has failed to obtain permission from the Ninth Circuit Court of Appeals to file a "second or successive" petition as mandated by 28 U.S.C § 2244(b)(3)(A). (Dkt. 11 at 6.) Respondent argues that the instant petition is "second or successive" because petitioner's current sentencing claim was ripe at the time he filed his 1998 habeas petition, and therefore, he should have either raised it at that time, or he should have waited to file a petition until his sentencing claim was exhausted.[3] (Dkt. 11 at 6-8.) Respondent concludes that because petitioner chose to file a habeas petition in 1998 that did not include the current sentencing claim, he cannot return to federal court to pursue relief now without first satisfying 28 U.S.C. § 2244(b). (*Id.* at 9.)

[3] It is not clear to the Court how respondent determined petitioner's claim to be both "ripe for review" and "unexhausted" at the same time. (*See* Dkt. 11 at 8-9.)

Petitioner answers that while his claims challenging his conviction were ripe for review in 1998, and were at risk of being precluded by the statute of limitations if not filed at that time, his current sentencing challenge was not ripe because it had not yet been exhausted in the state courts. (Dkt. 13 at 7.) Petitioner further argues that, in fact, at the time he filed the challenges to his conviction in this Court, he had just been re-sentenced for a third time and he had filed a direct appeal in the Court of Appeals for the State of Washington; therefore, it would have been Improper to raise the sentencing claim in 1998. (*Id.* at 7-8.) Petitioner also contends that he could not have waited until his sentencing appeal had been exhausted before filing his challenge to the underlying conviction, as the conviction had been affirmed on appeal in the state courts, and any claim challenging that conviction in federal court would have expired in January 1999. (*Id.* at 7.) For the following reasons, the Court agrees.

As a threshold matter, the Court finds that petitioner's current sentencing claim was not ripe for review at the time he filed his first habeas petition in 1998. Indeed, the parties agree that petitioner had not exhausted the claim in the state courts at the time of filing, and therefore, this Court could not have reviewed it. (*See* Dkt. 11 at 8-9.) Thus, had petitioner raised the claim in 1998, he would have presented a "mixed petition," which would have necessarily been dismissed by this Court until his sentencing claim was exhausted. *See Rose, supra.* Yet, this is exactly the scenario that respondent asserts should have occurred. (*Id.* at 6.) Respondent then concedes that had petitioner raised the sentencing claim in his first petition, and had the Court then dismissed the petition without reaching the merits, petitioner would not now be

filing a "second or successive" petition, as supported by *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998) (holding that a claim previously dismissed as premature does not qualify as "second or successive" for Antiterrorism and Effective Death Penalty Act's ("AEDPA") purposes), and *LaGrand v. Stewart,* 170 F.3d 1158 (9th Cir. 1999) (holding that petitioner was not required to obtain leave to file a second or successive habeas petition where that claim was not ripe at the time of petitioner's first habeas petition). (Dkt. 11 at 7.)

The Court finds respondent's argument to be misguided. A previously filed habeas petition does not necessarily render a subsequent petition "second or successive." *See Hill v. Alaska*, 297 F.3d 895 (9th Cir. 2002). In *Hill,* the Ninth Circuit stated that since "AEDPA does not define the terms 'second or successive[,]' [t]he Supreme Court, the Ninth Circuit, and our sister circuits have interpreted the concept incorporated in this term of art as derivative of the 'abuse-of-the-writ' doctrine developed in pre-AEDPA cases." *Hill*, 297 F.3d at 897-98 (citations omitted). In *McCleskey v. Zant,* 499 U.S. 467 (1991), the Supreme Court explained that "the abuse-of-the-writ doctrine . . . [has] concentrate[d] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *Id.* at 490. In the instant case, petitioner did not raise the challenge to his sentence in his 1998 petition because he knew to do so would be futile (*See* Dkt. 13 at 8-9.) The claim was pending on direct appeal in the state courts and therefore this Court could not have reviewed it. Although petitioner had been sentenced, and arguably had the facts available on which to base a claim in his first habeas petition, he was precluded by law from properly raising it until the state

courts' final decisions had been rendered. It was not until 2000 that the sentencing court's decision became final. (Dkt. 12, Exh. 4.) It would be illogical to require petitioner to preserve his sentencing claim by raising it before it was ripe for review (and quite possibly moot depending on the outcome in the state appeals court), only to result in this Court dismissing the claim as unexhausted, just so that he could later bring a second habeas petition without leave of the Ninth Circuit.

Respondent argues alternatively that petitioner should have waited to file all of his claims until after his sentence became final in December 2000. (Dkt. 11 at 8-9.) This, too, is misguided. Had petitioner waited to file his claims challenging his conviction, he was at risk of losing the opportunity to present them in 2002 due to the one-year statute of limitations imposed under AEDPA. Arguably, petitioner's conviction became final on June 9, 1997, when the Court of Appeals for the State of Washington affirmed his conviction but overturned his sentence. (Dkt.. 12, Exh. 3.) His case was remanded to the trial court solely for the purpose of re-sentencing. While petitioner continued to challenge his new sentence on direct appeal, his claims challenging the conviction had been exhausted. In fact, this Court, in reviewing petitioner's 1998 petition, agreed that his claims were ripe for review. (*See* Case No. C98-1844L, Dkt. 38.) This Court determined that the properly exhausted claims should be addressed on the merits, and subsequently denied them as without merit. (*See id.* at 16.) Thus, this Court apparently agreed that petitioner's conviction was final and ripe for review, despite the pending appeal of his sentence.

In *Martinez-Villareal, supra,* the Supreme Court addressed the situation where a petitioner has raised a

claim in his first petition, which is then dismissed by the District Court as premature, and then is raised later in a second habeas petition when it becomes ripe for review. *Martinez-Villareal,* 523 U.S. at 643. In that case, the government argued that because the petitioner had already raised the claim in his first petition, he must obtain leave from the Circuit Court before proceeding with a second habeas challenge. *Id.* The Court rejected the argument, stating that "[i]f [the government's] interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." *Martinez-Villareal,* 523 U.S. at 644. While the Court limited its holding to cases where a claim has been previously raised, dismissed as premature, and then re-raised, this Court finds that the same reasoning applies to the instant case. *See Martinez-Villareal,* 523 U.S. at 645 n.*.

In both situations, the petitioner has not received an adjudication of his claim by the federal court. The *Martinez-Villareal* Court recognized the necessity of exhausting claims in the state courts before allowing habeas review. The holding was grounded on the fact that petitioner's claim was premature and could not be heard by the federal court in his first petition, not on the fact that he had given notice to the Court by raising it once prematurely and then raising it a second time when it was ripe. *See Martinez-Villareal,* 523 U.S. at 644-45. Although the Court also stated that the *Martinez-Villareal* case did not present a situation where a petitioner was raising a claim for the first time in a second petition, as is the instant case, the Court did not say this situation would result any differently *Martinez-Villareal,* 523 U.S. at 645 n.*. Rather, the Court stated that it "ha[d] no occasion to decide whether

such a filing would be a 'second or successive habeas corpus application' within the meaning of AEDPA." *Id.*

Finally, in *LaGrand, supra,* the Ninth Circuit held that a petitioner is not required to obtain leave from the Ninth Circuit to file what is "functionally" a first petition as to a previously unripe claim *LaGrand,* 170 F.3d at 1160. Again, respondent argues that this case does not apply to the instant situation because petitioner is raising a new claim for the first time, and *LaGrand* involved a petitioner who had raised the claim in his first petition, the Court dismissed it as unripe, and then the petitioner raised it again when it became ripe. (Dkt. 11 at 7-8.) The Court finds this difference to be immaterial. In *Hill, supra,* the Ninth Circuit recognized that the term "second or successive" did not apply "if the [petitioner] did not have an opportunity to challenge the state's conduct in a prior petition." *Hill,* 297 F.3d at 898. Here, petitioner did not have the opportunity to challenge his sentence in 1998 because his sentencing claim was not ripe for review as respondent asserts. Moreover, as discussed above, petitioner could not have waited to file his 1998 petition or he would have risked losing the opportunity to challenge his underlying conviction. Therefore, the Court finds that the instant habeas petition is not "second or successive," and thus, does note require leave under 28 U.S.C. § 2244(b) to pursue the claim on the merits.

Claims One, Two and Three – Improper Increase in Offender Score/Vindictiveness

Petitioner first claims that his due process rights were violated when the sentencing court improperly increased his offender score at his third re-sentencing in order to justify imposing an exceptional sentence (Dkt. 3 at 5.)

Petitioner argues that his three previous King County convictions should have been merged for sentencing purposes, but that instead, the sentencing judge, with actual vindictiveness, chose to un-merge all prior convictions in order to continue to impose an exceptional sentence. (Dkt. 13 at 9-10.) Petitioner concludes that had the sentencing judge merged all prior convictions, his offender score would have been 9 instead of 16, and therefore, his sentence would have been less severe. (*Id.* at 15.) Petitioner also argues that the trial court imposed an exceptional sentence based on aggravating factors that were either previously rejected or not offered. (Dkt. 3 at 5.) Respondent answers that the state courts reasonably denied petitioner's claims because the Superior Court properly sentenced petitioner under Washington law, and because petitioner has failed to prove actual vindictiveness. (Dkt. 11 at 11.)

In denying petitioner's first claim, the Court of Appeals for the State of Washington stated:

> Burton argues that the sentencing court exceeded its scope on remand and invoked a *Pearce* presumption (again) by imposing the same aggregate sentence. The *Pearce* presumption arises when the amended sentence is more severe than the original sentence following a partially successful appeal. *Pearce,* 395 U.S. at 723-26. When the sentencing court does not increase the aggregate period of incarceration, the *Pearce* presumption does not arise. *State v. Larson,* 56 Wn. App. 323, 326, 783 P.2d 1093 (1989). Here, the sentencing court did not increase Burton's aggregate sentence
>
> Nonetheless, the *Pearce* presumption also arises when parole considerations can make the

period of incarceration under the amended sentence longer than the original sentence. *See Steele,* 988 F.2d at 998 (parole after serving one-third of sentence was more severe than the original sentence that gave discretion to parole board). Previously on appeal, the Court of Appeals held that Burton's amended sentence was more severe than his original sentence because he was eligible for nearly four years fewer good time credits. *Burton,* 1997 WL 306429, at *14. This was so because the amended sentence ran concurrently so that the entire period of incarceration followed the 562-month rape sentence which limits good time to 15 percent of the term as opposed to one-third for non-rape offenses. RCW 9.94A150(1) After the appeal, however, the sentencing court imposed consecutive sentences (562 months total) that allow Burton the opportunity to earn good time credits as favorably as his original sentence. Burton will be able to reduce his sentences for robbery (105 months) and burglary (153 months) by up to one-third each and reduce his rape sentence (304 months) by 15 percent. RCW 9.94A.150(1) He is eligible to earn early release time in segments adding up to a total of 131.60 months as opposed to 130.74 months in the original sentence. *Burton,* 1997 WL 306429 at *14. His new sentence is slightly less severe than his original sentence. Accordingly, the *Pearce* presumption does not apply and the sentencing court did not exceed the scope of remand.

Burton further argues that the trial court exceeded the scope of remand in recalculating his offender scores. Generally, the law of the case doctrine would make the offender score binding in subsequent appeals. *State v. Worl,* 129 Wn.2d 426, 425, 918 P.2d 905 (1996). Except, the doctrine is

discretionary when controlling law changes between the appellate decision and proceedings on remand. *Coffel v. Clallam County,* 58 Wn.App. 517, 521, 794 P.2d 513 (1990). Before Burton's third sentencing hearing, the Washington Supreme Court held that under RCW 9.94A 360(6), a sentencing court may not count some concurrently-served prior convictions as one offense and count others separately. *State v. Bolan,* 129 Wn.2d 361, 365-66, 917 P.2d 125 (1996). Rather, the sentencing court must count concurrently served prior convictions as one offense or each as separate offenses. *Bolar,* 129 Wn.2d at 366. Since the Washington Supreme Court made this ruling before the third sentencing hearing, the sentencing court was correct in recalculating Burton's offender score for rape as follows:

Offense	**Sentence Date**	**Cause No.**	**Score**
Forgery	5/31/1991	90-1-06110-4	1
Fraud (Indiana)	1/9/1992	10E01 9110 CF 636	1
Theft (Indiana)	1/9/1992	10E019110 CF 636	1
Sexual Exploitation of a Minor	11/20/1992	92-1-02798-1	3
Child Molestation 2	11/20/1992	92-1-02798-1	3
Rape of a Child 2	11/20/1992	92-1-02798-1	3
Robbery 1	(Count II)	93-1-06948-7	2
Burglary 1	(Count III)	93-1-06948-7	2
Offender Score for Rape			**16**

Following *Bolar*, the court properly added Burton's offender score for rape after counting his concurrently served prior convictions as separate offenses. Therefore, the court did not exceed the scope of remand.

(Dkt. 12, Exh. 2 at 6-8 (footnote omitted).)

Petitioner relies on the "law of the case doctrine" for the proposition that the sentencing judge was required to use the same method of computing his offender score because the Court of Appeals for the State of Washington had affirmed the calculation; thus, the judge should have merged his prior King County convictions as she had done with the prior Indiana convictions, instead of un-merging the Indiana convictions so that she could also count the King County convictions separately. (Dkt. 13 at 10-11.) Petitioner's reliance on the doctrine is misplaced.

In *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997), the Ninth Circuit Court of Appeals explained that the "law of the case is a discretionary doctrine," and that the doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Jeffries,* 114 F.3d at 1489 (quoting *Messenger v. Anderson,* 255 U.S. 436, 444 (1912)); *see also Merritt v. Mackey,* 932 F.2d 1317, 1320 (9th Cir. 1991) ("The doctrine is discretionary, not mandatory."). The Ninth Circuit noted, however, that this discretion is not unlimited. The Court stated that "the prior decision should be followed unless: '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, *(2) intervening controlling authority makes reconsideration appropriate,* or (3) substantially different evidence was adduced at a subsequent trial.'" *Jeffries*, 114 F.3d at 1489 (emphasis added) (footnote and citations omitted).

In the instant case, new controlling authority was created between the date of the appellate decision and the date of petitioner's third re-sentencing. (*See* Dkt. 13 at 9-10.) This created an exception to the "law of the case" doctrine, and provided a basis for the sentencing judge to reconsider the calculation of petitioner's offender score.

Therefore, the Court of Appeals' decision pertaining to the re-calculation of petitioner's offender score was not contrary to, or an unreasonable application of, established federal law.

Petitioner next claims that the trial court erred in considering additional aggravating factors on remand, specifically one that had been raised before and then rejected, and one that had never been offered on the evidence. (*Id.* at 13.) The state appeals court had rejected this claim on the basis that the sentencing judge's decision had also been based on aggravating factors that were presented at earlier sentencing hearings, and therefore, found no error in citing to the additional factors. (Dkt. 11 at 16.) Petitioner does not articulate a specific objection to that decision, other than that it gives rise to the conclusion that the sentencing judge was actually vindictive, as discussed below. (*See* Dkt. 13 at 14-16.)

Petitioner argues that the cumulation of the trial judge's decisions during petitioner's third re-sentencing proves her actual vindictiveness. (*Id.* at 13-16.) Petitioner cites to the fact that: (1) this was the third time she had been asked to re-sentence him; (2) she un-merged his prior convictions in order to preserve the exceptional sentence she had already imposed, (3) she cited to new aggravating factors in support of the new sentence, and (4) she imposed an "alternative" sentence in case her aggregate sentence was reversed on appeal.[4] (Dkt. 13 at 14-15.) Petitioner states that "[a]lthough the actual sentence [he] received at

[4] The Court of Appeals for the State of Washington subsequently vacated the "alternative" sentence imposed by the trial judge at the same time the Court affirmed petitioner's third sentence. (Dkt. 12, Exh. 2 at 11-12.)

the third sentencing was arguably 'not more severe' than the sentence he received at the previous sentencing, it was more severe than the sentence he should have received if the sentencing judge did not go out of her way to reverse her previous rulings and adopt new and previously-rejected aggravating factors." (Dkt. 13 at 14.)

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Supreme Court held that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. . . [D]ue process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Pearce*, 395 U.S. at 725. The Court further held that "[i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear." *Id.* at 726. Here, petitioner did not receive a more severe sentence than was previously imposed, and, in fact, he is now eligible for slightly more "good time credit" (Dkt. 12, Exh. 2 at 7.) Therefore, the *Pearce* presumption of vindictiveness does not arise as a result of imposing the same aggregate sentence. Petitioner argues, however, that the presumption arises because the judge actually raised his offender score for the third sentence. (Dkt. 13 at 15.) The Court disagrees with this argument since it has already determined that the new calculation of petitioner's offender score did not violate his constitutional rights, as discussed above.

Petitioner further argues that "'where the prophylactic rule of *Pearce* does not apply, the defendant may still obtain relief if he can show actual vindictiveness upon

resentencing.'" (Dkt. 13 at 14 (quoting *Texas v. McCullough,* 475 U.S. 134, 138 (1986) (citation omitted).) The Court does not believe petitioner has proven actual vindictiveness. First, petitioner received a "better" sentence than he had received earlier as he now has an opportunity to earn more early release credits. Second, as discussed above, the Court has found that there was no impropriety in recalculating his offender score. Third, although the sentencing judge cited additional aggravating factors in support of the imposed exceptional sentence, the "exceptionality" of the sentence did not rely on the additional factors, so there was no prejudice to the petitioner by citing them. (*See* Dkt. 12, Exh. 2 at 11.) Finally, the state court of appeals noted that the presumption of vindictiveness had arisen from petitioner's second re-sentencing "only because the sentencing judge ran Burton's sentences concurrently instead of consecutively. . . . The presumption of vindictiveness was a technical one. Nothing in the record indicates that the sentencing judge, (who was also the trial judge), possessed actual bias towards Burton." (Dkt. 12, Exh. 2 at 5.) Therefore, the fact that the *Pearce* presumption was applied to petitioner's re-sentencing previously does not convince the Court that the judge was actually vindictive at the third re-sentencing. Thus, petitioner's claims that his sentence violated his due process rights fails

Finally, petitioner argues that his sentence violates the recent decision by the Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* ___ U.S. ___, 122 S. Ct. 2428 (2002), in that the sentenced imposed was above the statutory maximum and was based on factors determined by the judge, not the jury. (Dkt. 13 at 17-27.) Respondent answers that petitioner's sentence

does not exceed the statutory maximum for his crime, so *Apprendi* and *Ring* do not apply. (Dkt. 11 at 17.) The Court agrees with respondent. Petitioner attempts to assert that he is serving 562 months only for his first degree rape conviction, while ignoring the fact that he was also convicted of first degree robbery and first degree burglary, with a weapon enhancement on all three crimes. Petitioner actually received an aggregate 562-month sentence for all three counts – 304 months for the rape count, 153 months for the robbery count and 105 months for the burglary count, to run consecutively. (Dkt. 12, Exh. 2 at 4.) Petitioner concedes that the maximum penalty he could have received for the rape was 304 months. (Dkt. 13 at 25.) This is, in fact, what he received. Petitioner makes no mention of the other two parts of his aggregate sentence. Thus, petitioner's sentence was not outside the statutory maximum for his crime, and he fails to show any due process violation Accordingly, the Court should dismiss petitioner's habeas action with prejudice.

CONCLUSION

For the reasons set forth above, I recommend petitioner's claims for federal habeas relief be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report and Recommendation

DATED this 8 day of November, 2002.

/s/ John L. Weinberg
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LONNIE L. BURTON, Petitioner, v. DOUG WADDINGTON, Respondent.	CASE NO. C02-140L ORDER DENYING HABEAS PETITION (Filed Dec. 17, 2002)

The Court, having reviewed the Petition for Writ of Habeas Corpus, Respondent's Answer, the Report and Recommendation by the Honorable John L. Weinberg, United States Magistrate Judge, and the remaining record, finds and Orders as follows:

(1) The Court adopts the Report and Recommendation.

(2) Petitioner's Petition for Writ of Habeas Corpus (Dkt. #3) is DENIED and dismissed with prejudice.

(4) The Clerk shall send copies of this order to counsel for each party and to the Honorable John L. Weinberg

DATED this 17th day of December, 2002.

/s/ Robert S. Lasnik
ROBERT S. LASNIK
United States District
Court Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LONNIE L. BURTON, Petitioner-Appellant, v. DOUG WADDINGTON, Respondent-Appellee.	No. 03-35095 D.C. No. CV-02-00140-RSL MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued May 3, 2004
Submission Vacated May 11, 2004
Submitted July 28, 2005
Seattle, Washington

(Filed Jul. 28, 2005)

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

Lonnie Lee Burton ("Burton") appeals the district court's denial of his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In 1994, a jury convicted Burton of rape in the first degree, robbery in the first degree, and burglary in the first degree.[1] Burton challenges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] As the parties are familiar with the facts, we do not recite them here.

his consecutive sentence of 304 months for the rape, 153 months for the robbery, and 105 months for the burglary, for a total of 562 months on several constitutional grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253 and we affirm. We review *de novo* a district court's denial of a petition for writ of habeas corpus under 28 U.S.C. § 2254. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir. 2001).

I.

The state argues that the district court lacked jurisdiction over Burton's 2002 habeas petition because this court had not granted leave to file a "second or successive" petition pursuant to 28 U.S.C. § 2244(b)(3)(A). We disagree. In 1998, Burton filed his first federal habeas petition challenging his conviction. At that time, the state court judgment as it related to Burton's sentence was not yet final because Burton's challenge to his sentence was still pending before the state court of appeal. Because Burton had not yet exhausted his federal constitutional claims in state court at the time he filed his first federal habeas petition, they were not ripe for federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A) (requiring a state prisoner to exhaust his claims in state court before he is allowed to bring an action in federal court for habeas relief). Therefore, Burton was not required to challenge his sentence in his first federal petition because no meaningful relief would have been available at that time. *See LaGrand v. Stewart*, 170 F.3d 1158, 1159 (9th Cir. 1999) (order). We agree with the district court that Burton's petition is not "second or successive" because he had a "legitimate excuse for failing to raise a claim at the appropriate time." *See McClesky v. Zant*, 499 U.S. 467, 490 (1991).

II.

Burton claims that his due process rights were violated when the trial court increased his offender score at the sentencing hearing by separately counting his Indiana theft and fraud convictions, rather than aggregating them as it had done in the first and second sentencing hearings. Because Burton has not shown that the Washington Court of Appeals' application of the law of the case doctrine was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States" 28 U.S.C. § 2254(d)(1), we affirm the district court's denial of relief on this claim.

III.

Burton next argues that his due process rights were violated because the sentencing court was vindictive in imposing an exceptional sentence at his third sentencing hearing. As the Washington Court of Appeals noted, Burton's third sentence is lower than his original sentence, and is therefore not presumptively vindictive under *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794 (1989). Because Burton has not shown that the trial court was vindictive in violation of clearly established federal law, Burton's claim is not cognizable under 28 U.S.C. § 2254(d)(1).

IV.

Finally, Burton argues that his exceptional sentence was imposed in violation of his Sixth Amendment rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). We expanded the Certificate of Appealability and requested

supplemental briefing on the impact of *Blakely* and *United States v. Booker,* 125 S. Ct. 738 (2005), on this case.

Although *Apprendi* was decided before Burton's conviction became final and may therefore be applied to this case, the state argues that *Blakely* – decided after Burton's conviction became final – established a new rule that does not apply retroactively on collateral review. *See Teague v. Lane,* 489 U.S. 288, 310 (1989). We agree. *See Schardt v. Payne,* ___ F.3d ___, 2005 WL 1593468 (9th Cir. July 8, 2005) (holding that *Blakely* does not apply retroactively to a 28 U.S.C. § 2254 habeas petition).

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490. The statutory maximum for each of the offenses to which Burton was found guilty was life imprisonment. *See* WASH. REV. CODE §§ 9A.44.040(2), 9A.52.020(2), 9A.56.200(2) (classifying rape in the first degree, burglary in the first degree, and robbery in the first degree as class A felonies); § 9A.20.021(1)(a) (setting statutory maximum for class A felonies as life imprisonment). At Burton's third sentencing hearing, the judge imposed consecutive sentences of 304 months for the rape conviction, 153 months for the robbery conviction, and 10.5 months for the burglary conviction, for a total of 562 months. Because the sentence on any individual count, and the total sentence imposed does not exceed the statutory maximum of life imprisonment, it does not violate *Apprendi. See United States v. Shryock*, 342 F.3d 948, 989 (9th Cir. 2003) (holding that where statutory maximum for murder in either the first or second degree was life imprisonment, court did not err in sentencing under provision for

first degree murder on the basis of judge-found facts); *United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir. 2002) (holding that *Apprendi* was not violated where sentence imposed did not exceed the statutory maximum); *see also United States v. Buckland*, 289 F.3d 558, 570 (9th Cir. 2002) (en banc) (finding no *Apprendi* violation where none of the individual sentences imposed consecutively exceeded the statutory maximum for that offense).

Accordingly, we **AFFIRM**.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONNIE LEE BURTON, Petitioner-Appellant, v. DOUG WADDINGTON, Respondent-Appellee.	No. 03-35095 D.C. No. CV-02-00140-RSL Western District of Washington, Seattle ORDER (Filed Oct. 13, 2005)

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b).

Therefore, the petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 5, 2006

Mr. Brian Tsuchida
Office of the Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, WA 98101

Re: Lonnie Lee Burton
v. Douglas Waddington, Superintendent,
Stafford Creek
Corrections Center
No. 05-9222

Dear Mr. Tsuchida:

The Court today entered the following order in the above-entitled case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted."

Sincerely,

William K. Suter, Clerk

by /s/ DJ McNerney

Denise McNerney
Merits Case Clerk